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QUESTION PRESENTED

Whether the Federal Communications Commission's Congressionally mandated policy of considering minority status as one of several enhancing factors in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

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No. 89-453

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. For many years attorneys of the Legal Defense Fund have represented parties in litigation

before this Court and the lower courts involving a variety of race discrimination and remedial issues, including questions involving the proper scope and interpretation of the Fourteenth and Fifth Amendments. The Legal Defense Fund believes that its experience in this area of litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The FCC's minority ownership policies are a constitutional remedy to societal and industry related discrimination that has led to an absence of significant minority perspective in the broadcast media. The historic relationship between Congress and

the FCC make it clear, that these policies could not have been considered, instituted or maintained without the encouragement and insistence of Congress.

The Congressionally mandated minority ownership policies now under review, do nothing more than apply the principle that has been the hallmark of FCC regulation for six decades: that diversity of ownership leads to diversity of perspective. This principle embodies the FCC's attempt to promote First Amendment values without government regulation of or supervision over speech. Thus the minority ownership policies are consistent with Congressional and FCC policy of promoting vigorous public debate - not by imposing content restrictions on broadcasters - but by permitting different voices to be heard.

Over the years, every governmental body that has examined the issue, from the

Kerner Commission, to the FCC, to Congress, to the courts themselves, have found that the perspective of minorities has been absent from the media, and that the solution to this dilemma was to increase minority participation and ownership. The history and development of African American participation in the media, print and broadcast, demonstrates that media owned by African Americans brings a distinctive perspective to the qualitative judgments involved in presenting news and entertainment.

ARGUMENT

I.

HISTORICALLY CONGRESS HAS IMPOSED ITS WILL ON THE FCC THROUGH A VARIETY OF FORMAL AND INFORMAL MEANS

The assertion that "Congress acts only by enacting legislation"[1] completely ignores the reality of the six decades of interaction between Congress and FCC That is, despite its broad regulatory independence, Congress has, since the creation of the Commission, actively sought to constrain the FCC from exceeding the

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[1] Brief For The United States As Amicus Curiae Supporting Petitioner, Metro Broadcasting, Inc. v. Federal Communications Commission, et al., No. 89-453, p. 15. The Solicitor General apparently uses this reference to infer that the appropriations riders which Congress passed to prevent the reevaluation of the minority enhancement programs should not be considered as legislation, or as an expression of Congressional intent.

bounds of its statutory mandate.[2] First, the statutory limit on the tenure of commissioners, and the requirement that the Senate confirm all appointments to the Commission are built in sources of Congressional control.[3] In addition, Congress has repeatedly used such techniques as Congressional investigations, control over FCC appropriations, moratoria, and standing committee oversight, as well as substantive legislation, and the threat

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[2] Newton Minow, former Chairman of the F.C.C., recounts the following encounter with Speaker of the House Sam Rayburn shortly after being appointed Chairman. According to Mr. Minow, Speaker Rayburn embraced him and said: "Just remember one thing son. Your agency is an arm of the Congress. You belong to us. Remember that, and you'll be all right." The Speaker went on to warn Minow to expect pressure, but Minow recalls, "what he did not tell me was that most of the pressure would come from the Congress itself". Minow, Book Review, 68 Colum. L. Rev., 383, 383-4 (1968).

[3] 47 U.S.C. 154(c) (1982)

of legislation to assert its authority over the Commission.

Communications regulation began in this country with the Radio Act of 1927,[4] which contained the general public interest standard and delegated broad authority to the Radio Commission. Congressional distrust of this authority burgeoned almost immediately, however, and the Communications Act of 1934 repealed the Radio Act and transferred its grant of power to the Federal Communications Commission. In the ensuing six decades, Congress has enacted "relatively little" legislation regulating broadcast

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[4] Pub. L. No. 632, 44 Stat 1162 (1927). Earlier efforts at regulation have been described as completely ineffective. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 375-77 (1969).

programming.[5] Thus statutory control, the most obvious congressional activity, "is noteworthy for its relative unimportance in broadcast regulation".[6]

Despite the relative dearth of substantive legislation restricting or extending the FCC's broad mandate of authority, Congress has maintained a close watch over Commission activity and has had a tremendous amount of influence in the formulation and direction of FCC rules and regulations.

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[5] T. Dyk and R. Goldberg, "The First Amendment and Congressional Investigation of Broadcast Programming", 3 JLPOL 625, 628 (1987).

[6] Krasnow and Shooshan, "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission", 10 Harvard J. On Legis. 297, 301 (1973).(Hereafter cited as Krasnow and Shooshan.

The FCC's status as an independent agency amplifies its dependence on Congress. That is, independent agencies:

> are not part of any executive department, they must function without the political protection of the President or cabinet officer. They also lack any effective means of appealing for popular support. As a result, members of Congress have little fear of political reprisal when interacting with these defenseless agencies.[7]

In fact, the lack of substantive legislative guidelines for the FCC makes it all the more vulnerable to other forms of congressional influence.[8] According to Paul E. Comstock, a former vice president and general counsel for the National Association of Broadcasters, "[m]ost of our

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[7] Shooshan and Kransnow, "Congress and the Federal Communications Commission: The Continuing Contest for Power", 9 Comment 619 (1986-7),(Hereafter cited as Shooshan and Kransnow.

[8] Krasnow and Shooshan, supra at 305.

work is done with congressional committees. We concentrate on Congress. We firmly believe that the FCC will do whatever Congress tells it to do, and will not do anything Congress tells it not to do."[9]

From its inception, and for the first three decades of its existence, the FCC was almost always under Congressional investigation or the threat of one. Indeed, "probably no other federal agency has been the object of as much prolonged investigation by Congress as the FCC"[10] Er fifteen years prior to the adoption of "network regulations", Congress pressured the FCC, and before that the Radio

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[9] Thorp, "Washington Pressures", 2 National J. 1807, 1809 (1970).

[10] W. Emery, "Broadcasting And Government", 310, 396 (1971). See also, T. Dyk and R. Goldberg, The First Amendment and Congressional Investigation of Broadcast Programming, 3 JLPOL 625, 626-7 (1987).

Commission, on the issue of whether, and how, to regulate the growth of radio networks. During that period, "in virtually every session of Congress, the evils of monopoly in the broadcasting industry were oratorically deplored, and the FCC was frequently chided for not riding herd on network practices."[11]

In 1943, the House passed a resolution setting up a select committee to scrutinize the organization, personnel and activities of the FCC[12] And, in 1971, the House held hearings to investigate the problem of "staged" news and documentaries on television.[13]

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[11] Id.

[12] H.R. Res. 21, 78th Cong., 1st Sess., 89 Cong. Rec. 26, 235 (1943).

[13] Hearings Before the Special Investigation Subcommittee of the House Interstate and Foreign Commerce Committee, 92nd Cong., 1st Sess. (1971).

> By helping to keep the FCC responsive and attuned to the wishes and expectations of segments of the public, as expressed through Congress, they illustrated just how effective properly conducted investigations could be in achieving some of the goals of Congressional oversight.[14]

As the pace of deregulation accelerated during the Reagan years, Congress began to respond specifically to attacks on various FCC rules. In a rider to the Budget Reconciliation Act of 1981, Congress revoked the FCC's permanent authorization and placed it on a two-year authorization, in keeping with its treatment of other executive agencies during this period.[15] This allowed Congress

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[14] Krasnow and Shooshan, supra at 313.

[15] House Budget Committee, 95th Cong., 1st Sess., Congressional Control of the Budget 19, 22-4 (Committee Print 1977). At the end of World War II, 95% of the federal budget was under permanent authorization. In the 1970's, Congress

to amend the Communications Act every two years. The new authorization also allows Congress to influence FCC policy in less formal ways.[16] The Conference Report reasoned that

> regular and systematic oversight will increase the Commission's accountability for the implementation of Congressional policy. . . . The Commission, in turn, will have a better appreciation of Congressional intent.

H.R. Cong. Rep. No. 208, 97th Cong., 1st Sess. 899 (1981).

Though less formal methods of Congressional influence can work tremendous reversals at the FCC, Congress has used the appropriations process both often and

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shifted an increasing number of agencies to annual or multi-year authorizations. Approximately one half of the budget remains under permanent authorization.

[16] Krasnow and Shooshan, supra 303.

creatively in its ongoing effort to control the activities of the Commission.

Each house of Congress has promulgated internal rules limiting the use of appropriations riders to enact substantive legislation[17]. Nevertheless, Congress has frequently used appropriations riders to enforce its will on the Commission. This has become even more evident since the FCC was placed on two-year authorization in 1981.[18]

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[17] House Rule XXI(2), reprinted in Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess. 573 (1987); Senate Rule IV(4), reprinted in Standing Rules of the Senate, Sen. Doc. No. 4, 100th Cong., 1st Sess. 10-12 (1987). These rules are not constitutionally compelled, and are frequently waived.

[18] Congress has absolute discretion not only over the amount of money allocated to the Commission but also over the purposes for which such funds are to be used. Subcommittees of both houses' Appropriations Committees hold annual hearings to examine the F.C.C.'s budget requests and to question the commissioners

Appropriations riders come in two forms: positive and negative. Congress uses both to control the FCC. Positive riders require some action on the part of the Commission; such as the 1987 rider requiring the FCC to consider alternative means of enforcing the Fairness Doctrine and to report it findings to Congress.[19] Negative riders, known as limitation

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and top-level staff. Many opportunities exist, both at these hearings and elsewhere, for the subcommittees to "scrutinize FCC behavior and to communicate legislative desires to the officials involved . . . Although the reports are not law, the Appropriations Committees expect that they will be regarded almost as seriously as if they were". R. Fenno, The Power of the Purse, (1966), see generally and at 18.

[19] The 1987 continuing resolution stated that "funds appropriated to the Federal Communications Commission by this Act shall be used to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, Section 101(b), 100 Stat. 3341, 3341-67 (1986).

riders, restrict the Commission's ability to spend funds or to rescind or modify an existing policy. This is the type of rider used in 1988 to prohibit the FCC from reexamining its minority and female preference policies, which Congress has extended through fiscal years 1989 and 1990.[20] Appropriations riders sometimes express legislative intent concerning the policy or practice at issue. For example, in the minority preference limitation rider the Senate Appropriations Committee explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and

[20] Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987); Pub. L.No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).

> improved service to minority . . . audiences.[21]

The appropriations riders at issue in this case prohibit the FCC from spending money to rescind a policy that had been in effect for over ten years and had been addressed by Congress in the past only positively. The only feasible intent behind the riders, amply supported by the legislative history and the earlier legislation that prodded the FCC to develop minority preferences in the first place, is that Congress supported the preferences as they had been crafted by the FCC.[22]

In 1983, Congress used a negative rider to block the FCC's liberalization of

[21] S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

[22] See Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., No. 89-700, Brief for F.C.C. at 22-28.

its television group ownership rules.[23] This forced the FCC to reconsider, hold hearings, and eventually modify the rule to Congress' liking.[24] An appropriations rider in the 1988 Act "prohibited the FCC from modifying its rules limiting newspaper-television cross-ownership and from extending any existing waivers from those limits."[25] In the Commission's 1989 appropriations package, Congress directed the agency to promulgate regulations before January 31, 1989, aimed at enforcing the

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[23] Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat. 1467 (codified at 47 U.S.C. 156).

[24] Amendment of Section 73.3555, Memorandum Opinion and Order, 100 F.C.C. 2d 74, para. 3 (1985).

[25] H.R. Res. No. 395, 100th Cong., 1st Sess., 133 Cong. Rec. H12, 805, 14 (daily ed. Dec. 22,1987).

restrictions on broadcast indecency in 18 U.S.C. 1464 on a 24-hour a day basis.[26]

Occasionally Appropriations Committees have worked their will without legislation of any kind. In 1974, a well-publicized struggle between the FCC and Congress raged over the issue of sex and violence in television programming. During the 1960's and early 1970's, Congress had held a number of hearings about such programming. Finally, frustrated with what it perceived to be inadequate Commission attention to the problem, the House Appropriations Committee issued a report that, in strong language, gave the Commission a deadline for submission of a report outlining its proposals.[27] The report warned that while

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[26] Pub. L. 100-459; 53 Fed Reg. 52425 (Dec. 28, 1988). The regulations are found at 47 C.F.R. 73 (1989).

[27] H.R. Rep. No. 1139, 93rd Cong., 2d Sess. 15 (1974).

> [T]he Committee is reluctant to take punitive action to require the Commission to heed the views of the Congress, and to carry out its responsibilities ... if this is what is required to achieve the desired objectives, such action may be considered.[28]

The Senate appropriations Committee issued a similar report.[29] Eventually broadcasters, with FCC encouragement and promotion, adopted the "family viewing hour."[30]

A similar process led the FCC to expedite the processing of applications for low-power television stations in 1983.[31]

Another means of Congressional oversight and control of the Commission is

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[28] Id.

[29] S.Rep. No. 1056, 93rd Cong., 2d Sess. 19 (1974).

[30] Shooshan and Krasnow, supra at 627, 636.

[31] S. Rep. 206, 98th Cong., 1st Sess. 23 (1983).

the use of moratoria. Moratoria are conceptually similar to negative appropriations riders. However, rather than prohibiting the expenditure of funds, they merely disallow the agency from implementing a certain rule or decision for a given period of time. Though a moratorium and an accompanying report may convey Congressional views on an issue, its usual purpose is to give Congress time to review the issue. Thus a moratorium is usually used at one stage in an ongoing process of Congressional influence.

Congress first imposed a moratorium on the FCC in the 98th Congress, amidst the syndication and financial interest controversy.[32] The same Congress imposed a six-month moratorium to prevent the FCC

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[32] Shooshan and Krasnow, supra at 621.

from repealing the political attack and editorializing rules.[33]

Occasionally, however, a moratorium will be the only thing necessary to effect the desired FCC response. For instance, Congress in 1984 strongly opposed the FCC's efforts to modify and eventually eliminate its restrictions on group ownership of media interest. Shortly after the Commission announced its final decision to replace the rule with a more lenient version that would sunset in five years,[34] Congress imposed a moratorium on the agency's implementation of the revision.[35] During the moratorium, the FCC suspended

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[33] H.R. 2250 98th Cong., 1st Sess., 129 Cong. Rec. H9308-11 (daily ed. Nov. 8, 1983).

[34] Report and Order, 49 Fed. Reg. 31,877 (1984).

[35] Pub. L. No. 98-396, Section 304, 98 Stat. 1369, 1423 (1984).

its "final order", considered the legislators' views, and ultimately decided upon a rule similar to the lenient one previously announced but with a few additional features and without the automatic sunset provision.[36]

Similarly, the oversight of various standing committees of congress has forged a longstanding relationship which adds to the expertise gained by Congress in considering issues that come before the Commission. Since 1946, for example, the Commerce Committee of each house has been authorized to "make continuing studies of the problems in the communications industry."[37] Each committee holds general oversight hearings at the beginning of each

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[36] Amendment of 73.3555, 100 F.C.C. 2d 74 (1985).

[37] Legislative Reorganization Act of 1946, Section 136, 2 U.S.C. 190d (1970).

session. Subcommittees of the commerce committees also hold hearings on specific topics.[38] A significant advantage of close committee oversight is that "members and staff of the congressional committee acquire some of the substantive knowledge

[38] In 1971-72, the House Subcommittee on Communications and Power held hearings on spectrum management, diversification of ownership, broadcast service to meet community needs, children's programming, the fairness doctrine, political broadcasting, cable television, domestic satellites, common carrier activities, and public broadcasting. Hearings on the Jurisdiction and Activities of the FCC Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, 92d Cong., 1st Sess. (1971). Six of seven commissioners and key staff members testified.

During these hearings, Chairman MacDonald recommended that the FCC establish a Children's television bureau to deal with programming and advertising aimed at young people. Four months later the Bureau was created. Speech by Dean Burch Before the International Radio and Television Society in New York, Sept. 13, 1971.

necessary to challenge the agency's handling of complex problems."[39]

These committees and their subcommittees have played active roles in effecting the informal controls so effectively used by Congress. More generally, in 1958 the House Legislative Oversight Subcommittee produced a "long and comprehensive study" of FCC policies and procedures.[40] The Commission adopted many of its suggestions, including: having an individual commissioner supervise the preparation of majority opinions, establishing a fee system, and charging

[39] Krasnow and Shooshan, supra at 317.

[40] Regulation of Broadcasting, Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action, 85th Cong. 2d Sess. on H. Res. 99, U.S. Government Printing Office, Washington, D.C., 1958, pp. 157-58.

broadcasters for special services and privileges.[41]

In the late 1950's and early 1960's Congress grew concerned with increased "trafficking" in broadcast licenses.[42] The 85th Congress authorized a Special Subcommittee on Legislative Oversight to hold extensive hearings on the issue.[43] Though the resulting bill died in the 86th Congress, a virtually identical bill was pending in the 87th Congress when the FCC adopted anti-trafficking rules.[44] As a result, ostensibly because these rules were and continued to be satisfactory to Congress, no trafficking legislation emerged out of committee after the rules

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[41] W. Emery, Broadcasting and Government, at 385 (1971).

[42] 60 Tex. L. Rev. 207, note 64.

[43] Id.

[44] 32 F.C.C. 689 (1962).

were adopted. That version of the rules was cited favorably in a report of the House Committee on Commerce.[45]

The number of committees that have assumed oversight responsibilities for the FCC has increased significantly. When the Communications Satellite Act of 1962 was under consideration, FCC Commissioners testified before nine different committees and subcommittees.[46] In the 92d Congress, the Senate Agriculture and Forestry Committee held hearings on a bill to create a rural telephone bank,[47] and the House Merchant Marine and Fisheries Committee considered the Vessel Bridge-to-Bridge Radiotelephone Act.[48]

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[45] H. Rep. 97-765.

[46] 28 Cong. Q. Almanac 551-55 (1963).

[47] Pub. L. No. 92-12, 85 Stat. 29 (1971).

[48] 33 U.S.C.A § 1201-08 (1971).

This strict oversight by Congressional Committees has made the FCC extremely sensitive to the intent and desires of Congress, and, conversely, allows Congress to remain abreast of problems, policies and procedures affecting the broadcast media. It follows that in determining the basis for Congressional action, the courts must look beyond the narrow proceedings that accompany a single piece of legislation, and consider the broad expertise and experience of Congress in legislating in a particular area over time.

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Fullilove v. Klutznick, 448 U.S. 448, 502-503 (1980).

II.

CONGRESS HAD SUFFICIENT EVIDENCE BEFORE IT TO CONCLUDE THAT ENHANCEMENT OF MINORITY OWNERSHIP COULD BE EXPECTED TO CONTRIBUTE TO THE DIVERSITY OF PERSPECTIVE AVAILABLE

The Solicitor General[49] and Judge Williams in the dissent in below, fault Congress for failing to review sufficient evidence to draw a conclusion that has never been disputed, and that, in fact, has been the hallmark of FCC policy for 54 years: that the principle means of ensuring a diversity of programming is through a

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[49] Brief For The United States As Amicus Curiae Supporting Petitioner, Metro Broadcasting, Inc. v. Federal Communications Commission, et al., No. 89-453.

diversity of ownership.[50] Created by Congress by the Commissions Act of 1934, the FCC exercises broad authority to regulate the broadcast media for the convenience and in the interest of the public. 47 U.S.C. § 303. Multiple ownership rules, whereby the Commission enforces limits on the number of radio and television station licenses any person may hold, date back to the 1940's. The current limit is 12 licenses in each service (AM, FM or TV), and no person may hold licenses for television stations serving more than

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[50] In the 1940's the F.C.C. sought through pro-competitive regulations called chain broadcasting rules to limit the power of the national networks, to prevent possible future media concentrations, and to promote autonomy of licensees. See F.C.C. Report on Chain Broadcasting (1941). These regulations were upheld by the Supreme Court in NBC v. United States, 319 U.S. 190, 224, 226-227 (1943).

25% of the television households nationwide.[51]

In 1953, the Commission stressed that its rules limiting multiple ownership of broadcasting facilities, were designed to promote diversity of ownership in order to maximize diversity of ideas, information and program service.

> [T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.

Rules and Regulations Relating to Multiple Ownership of Standard, FM and Television

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[51] Minority owners, however, are permitted 14 stations per service and up to 30% of the national TV market. 47 C.F.R. § 73.3555 (1987): Amendment of Section 73.3555 of the Commission's Rules, 100 F.C.C. 17 (1984).

Broadcast Stations, 18 F.C.C. 288, 291 (1953).[52]

In 1965, the Commission released its Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 5 R.R. 2d 1901, (1965) asserting that "the first amendment . . . 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public'". Id. at 394 n.4 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1944)).

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[52] The Commission has also promulgated regulations restricting the cross-ownership of television and either cable systems or newspapers serving the same areas or markets. See 47 C.F.R. § 76.501 (1987); 47 C.F.R. § 73.3555(c) (1987). Here the Commission concluded that these regulations advanced the public interest by promoting dissemination of information from diverse viewpoints. The Supreme Court upheld these regulations in F.C.C. v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

The Commission identified six criteria that should be considered in comparative hearings, including: diversification of control - the aim of which is to prevent concentration of ownership control in the media;[53] and, full-time participation in operation by owners - here the Commission found that an owner's full-time participation promotes sensitivity to community needs, fosters better public service, furthers the goal of broadcasting diverse information, and reduces the possibility of ownership of multiple stations.[54] The Commission noted that its

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[53] An applicant with fewer pre-existing ownership interests in other mass media is preferred and gets merit in the comparative hearing process. 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395-395 (1965).

[54] Preferences for minorities are subsumed under this category, and thus "the relevant consideration is not minority ownership per se but the extent to which minority owners are integrated into the

basic policy objectives were to provide the best service to the public by promoting the greatest possible diversity of information and to ensure the maximum diffusion of control of the broadcast industry.[55]

Noting its belief that diversity of control of communications outlets is beneficial to a free society and is essential when the government limits access to the public use of television, the 1965 Policy Statement made clear that concentration of mass media ownership would have a deleterious effect on the

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proposed station's operation". New Continental Broadcasting Co., 88 F.C.C. 2d 830, 844 (Rev. Bd. 1981).

[55] 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395-396 (1965).

communication of new and disparate ideas. Id. at 394.[56]

Congress intended for the public interest to underlie the issuance of broadcast licenses, Radio Station WOW v. Johnson, 326 U.S. 120, 131-132 (1945), which are to be awarded so as "to provide a fair, efficient, and equitable distribution of radio service". 47 U.S.C. § 307(b). In support of the wide latitude granted the Commission to make the "predictive judgments" necessary to determine what is in the public interest, this Court has held that the Commission need not come forward with an in-depth

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[56] Even in rejecting the "Fairness Doctrine" Syracuse Peace Council, 2 F.C.C. 2nd 5043 (1987), aff'd 867 F.2d 654, 658 (D.C. Cir. 1989), the Commission stated that "we do not question the interest of the . . . public in obtaining access to diverse . . . sources of information". Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143,147 (1985).

factual report supporting its conclusions, since "the possible benefits of competition do not lend themselves to detailed forecast." F.C.C. v. R.C.A. Communications, Inc., 346 U.S. 86, 96 (1953).

This Court has recognized on a number of occasions that diversity of ownership of the mass media, including radio and television stations, is likely to enhance the diversity of ideas and expression favored by the First Amendment, and is an important societal concern. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1967).

In F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978), for example, this Court endorsed the Commission's long-standing practice of acting on the theory that

"diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power". There, this Court held that it is appropriate for the Commission to consider First Amendment and antitrust values.

Congress, the Court of Appeals and the Commission have all found in one form or another that

> [I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.

TV 9 Inc. v. F.C.C., 495 F.2d 929, 937-938 (D.C. Cir. 1973). See Citizens Communications Center v. F.C.C., 447 F.2d 1201, 1213 n.36 (D.C.Cir. 1971); H.R. Rep. No. 765 at 40; S. Rep. No. 182 at 76;

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d at 394; 1978 Minority Policy Statement, 68 F.C.C 2d at 980-981 (Pet. App. 134a-137a)

In 1968, the Report of the National Advisory Commission on Civil Disorders (Kerner Commission) focused attention upon the relationship of minorities and the media, noting the stereotypical presentation of blacks on television, the dominance of the media by whites, and suggesting a nexus between this and racial unrest in the country.

> The media report and write from the standpoint of a white man's world. . . . Slights and indignities are part of the Negro's daily life, and many of them come from what he now calls "the white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America.

Id. 366.[57]

The FCC responded to this by instituting a series of antidiscrimination and equal employment opportunity initiatives, justifying its intervention based upon the requirement that broadcast licensees serve the entire public.

In 1968, the Commission proposed rules to address employment discrimination in the broadcast industry.[58] In 1969, the

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[57] It is noteworthy that in 1990, this continues to be a problem. See, Reed, 'Black Pathology' is a Big Business, The Philadelphia Inquirer, February 3, 1990 at 7-A (describing the overreporting and overpresentation of black pathology and the underreporting and underrepresentation of white pathology on television). See also, Window Dressing On the Set: Women and Minorities in Television, A Report of the United States Commission on Civil Rights, August 1977; Window Dressing On the Set: an Update, A Report of the United States Commission on Civil Rights, January 1979.

[58] Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C. 2d 766 (1968).

Commission required broadcasters to adopt equal opportunity programs.[59] And, in 1970, the Commission required broadcasters to file annual reports on their employment by racial categories.[60]

In 1970, the Court of Appeals for the District of Columbia[61] held that comparative hearings considering the effect on diversity of programing were necessary.

> Since one very significant aspect of the "public interest, convenience, and necessity" is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which

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[59] Nondiscrimination in Broadcast Employment, 18 F.C.C. 2d 240 (1969).

[60] Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Employment Practices, 23 F.C.C. 2d 430 (1970).

[61] The District of Columbia Circuit is charged by the Act with original jurisdiction to hear appeals of FCC decisions, 47 U.S.C. § 402

> the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

Citizens Communications Center v. F.C.C., 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971)

III.

AFRICAN AMERICAN MEDIA DEMONSTRABLY PRESENTS A DIFFERENT PERSPECTIVE AND EMPHASIS THAN THAT PRESENTED BY THE MAJORITY MEDIA

The Congressional finding that diversity of ownership results in diversity of programming is amply illustrated by the experience of black media. Perhaps the best and longest running example can be found in the black press. Dating back to 1830, the black press' raison d'etre lay in what John Russwurm, co-publisher of the

first black newspaper, Freedom Journal, wrote in the first edition of the paper.[42]

> We wish to plead our own cause. Too long have others spoken for us. Too long has the public been deceived by misrepresentations in things which concern us dearly.

Today that difference is no less profound.

> The black press differs from the white (press) not so much in kind as in message. It reports news not covered by other journalism. It interprets that news differently, from an uncommon standpoint. It ventures opinions about matters not dealt with by other presses and its opinions frequently vary from those of

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[42] Freeman's Journal, (16 March 1827), reprinted in Martin E. Dann, The Black Press: 1827-1890 (New York: Putman & Sons, 1971), See also, Jeter, James Phillips, "A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned and Black-Oriented Stations, Ph.D. Dissertation, University of Wisconsin, 1981 p.34.(Hereafter cited as Jeter).

> other publications treating the same topics.[43]

During the past ten years there have been a number of academic studies examining the impact of minority ownership to see how it relates to service to minority communities. While these studies do not necessarily show a quantitative difference between white-owned and minority-owned stations in their commitment to news, public affairs and other non-entertainment programming,[44] they have found qualitative differences that reflect the diversity of

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[43] Roland E. Wolseley, The Black Press: U.S.A. (Ames, Iowa: Iowa State University Press, 1971), p.14.

[44] Jeter, supra at pp. 13[illegible] 142; Schement, Jorge Reina and Singleton, [illegible]oy A. "The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, Journal of Communication 31 (Spring 1981) 78-83.

content or perspective that the FCC policy is designed to foster.[65]

For example, when black-oriented radio stations licensed to white owners were compared to those licensed to black owners, black owners differentiated their product more than white owners, thus displaying more diversity of content with respect to

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[65] The Washington Post reported in 1973, that the influx of black owners would bring about a "new wave in content of black-oriented radio". The Post particularly noted the case of WSOK in Savannah, Georgia, which underwent a drastic change in its programming when the station changed from a White-Owned Black-Oriented Radio Station to a Black-Owned Black-Oriented Radio Station. Examining this development the Post quoted Theodore Ledbetter, a Washington, D.C. - based communications consultant, who said:

> Part of the new format being set up by black owners is less rigid programming. In the old days all you heard was James Brown and Wilson Pickett. This barred people like Nancy Wilson and almost all jazz artists.

Hollie West, "Black Radio: A Question of Ownership and Control," Washington Post, 29 January 1973, Sec. B. p. 5, Col. 2-3

their entertainment programming.[66] A related study focusing more particularly on qualitative issues found that a black-owned television station featured content that accurately reflected the owner's goals regarding specialized service to the black community.

> Specifically, ownership and management wanted more news about education, employment, international affairs with emphasis on black nations, and more community events and "people in the news" items. BCN [Big City News, the half-hour, daily, local newscast, broadcast by WGPR a black-owned UHF independent station serving the Detroit market] wanted to de-emphasize crime as news while emphasizing positive aspects of black Detroit through its "people in the news" and community events coverage. BCN wanted to emphasize coverage of the city of Detroit, and not the suburbs, and to report often on "racially significant" aspects of the news. The ownership and management also wanted to show a high number of blacks in the news as a vehicle to help make WGPR

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[66] Jeter, supra at pp. 136-142.

> part of the black community and to involve the community in the station. This was also seen as a way to raise viewer consciousness about the role of black Americans in city, state, national, and even international events.[67]

Another study analyzed four minority owned stations serving different populations with different philosophies of ownership obligations to the minority communities they serve and/or spring from.[68] This study analyzed the programming content of Hispanic-owned and Hispanic-oriented KORO-TV in Corpus Christi, Texas; Black-

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[67] Fife, Marilyn Diane, "The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content", Report to the National Association of Broadcasting, Office of Research and Planning, September, 1979 pp.44-45.

[68] Fife, Marilyn Diane, "The Impact of Minority Ownership on Minority Images in Local TV News", Presented at the 15th Annual Howard University Communications Conference, Washington, D.C., February 13-16, 1986.(Hereafter Fife, 1986)

owned and Black-oriented WGPR-TV in Detroit, Michigan; majority black-owned[69] but mainstream oriented WLBT-TV in Jackson, Mississippi; and black-owned WVII-TV in Bangor, Maine.

The study defines "narrowcasting" as arising where the minority ownership targets their own racial/ethnic community as a focus of service, and "mainstreaming" as where the minority ownership targets the general community in a manner common to commercial broadcast TV outlets, but imbues their service with a commitment to cultural pluralism rarely seen in majority-controlled TV outlets.

This study concluded that "narrowcasting" stations such as KORO and WGPR sought "to use a major form a mass

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[69] Sources vary on the precise percentage of black ownership, with statements ranging from 51% to 55%.

communication to validate and to showcase a minority culture" and "to create a broadcast institution that can function as a resource for a minority community at the local level".[70] Minority owned mainstreaming stations, such as WLBT were seen as attempting "to use a major form of mass communication to legitimize different components of the same community".

However, in the case of WVII, where neither narrowcasting or mainstreaming were possible because of the lack of a substantial minority community, the study nevertheless found that the minority owners showed a "special sensitivity to community needs and a willingness to take chances on non-traditional people in key positions".[71]

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[70] See Fife 1986, supra

[71] Id. at 26.

Percy Sutton, Chairman of Inner City Broadcasting, testifying before a Congressional Committee in 1989, gave as an example of the impact a black-owned radio station may have on politics and culture - even in the highly competitive media market of New York City - the victory of David Dinkins, an African American, in the Democratic primary for Mayor of New York City.

> In his acceptance speech- rather, the speech of thanks to his constituents, to the voters and others-he said, I want to thank Mr. Sutton and the WLIB family. Without the WLIB family permitting us to communicate, I could not possibly have won this Democratic primary. WLIB is a daytime radio station.
>
> It is the only daytime radio station in the City of New York. In evaluating where he would place the campaign manager, in evaluating where he would place his advertisements, his commercials, he found that to reach the black community . . . that he needed to reach, from which he came, the number one

> station to reach that community was WLIB, a daytime station.[72]

Significantly, the Congressional Research Service was quite clear as to the conclusion to be drawn from its analysis of the impact of black ownership on program content and perspective.

> [T]hese data indicate that certain conditions in ownership and in programming exist which suggest a positive relationship between minority broadcast station ownership and minority programming. That is, where minority ownership was found to exist among stations, that group of stations programmed

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[72] Hearing Before the Subcommittee on Communications of the Committee On Commerce, Science, and Transportation, United States Senate, 101st Congress, 1st Session on Minority Ownership of Broadcast Stations, September 15, 1989, p.24. See also at 25: "A recent poll conducted by New York Newsday by the Gallup Organization found that nearly 7 out of 10 Black New Yorkers surveyed said that they look to WLIB, its sister station WBLS (FM) and the City's leading Black weeklies as a source of news. Even more impressive, one quarter of those questioned said they rely on Black-owned radio and publications as their most important news source!"

> proportionately more to their own minority audiences as well as to other minority audiences than did those stations with no minority owners.[73]

Undergirding the fact of the recognition by Congress, the FCC and until now, the Court of Appeals, that diversity of ownership equals diversity of perspective, is the related recognition of the harm done by the exclusion of blacks from participation in the broadcast industry.

> Because blacks were not pleading their own cause, the content of the media became a voice <u>to</u> them rather than a voice <u>by</u> them. Because black people had no input into the ownership and decision-making function of hiring, program production, budgeting, promotion and scheduling; the result was a long line of situation comedies on television, "blaxploitation" films and "soul"

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[73] "Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?" at CRS-42.

radio stations which were nothing more than jukeboxes.[74]

IV.

CONGRESS HAS BROAD DISCRETION TO DETERMINE THE HARM DONE BY RACIAL DISCRIMINATION AND TO FORMULATE A REMEDY FOR THAT DISCRIMINATION

In City of Richmond v. J.A. Croson Co., 109 S.Ct 706 (1989), this Court held that racial preferences granted by state or local governments violate the Fourteenth Amendment's ban on governmental discrimination unless they are narrowly tailored to meet a compelling public interest. Thus while Croson marked the first time that a majority of the Court adopted strict scrutiny in the affirmative action context, it cannot be read as prohibiting Congress from taking race-

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[74] Jeter, supra at 10.

conscious action when it is necessary to meet a compelling public interest.

Indeed, even as applied to state and local governments, if the strict scrutiny components are met, then remedial race-conscience measures will be upheld. On the other hand, the Court in Croson acknowledged that the constitutional requirements are less stringent for the remedial race-conscience measures enacted by the federal government, than for those enacted by state and local governments.

Relying on and reaffirming Fullilove v. Klutznick, 448 U.S. 448 (1980), Justice O'Connor explicitly recognizes that Congress possesses "unique remedial powers" that enables it to use race-conscious

relief where states and cities cannot. Croson, 109 S.Ct. at 718.[75]

The distinctions that Croson acknowledged between federal and state power to use race-conscious measures means that even applying strict scrutiny, Congress retains significant discretion. It follows that the broader federal authority allows Congress to establish the factual predicate for its racial preferences without making findings of the same degree of precision and specificity as states and their subdivisions. Moreover, in analyzing whether a federal remedy is "narrowly tailored" to achieve a compelling

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[75] The Solicitor General concedes that the nature of the Congress demands that its determinations in this area be given greater deference then that accorded state and local bodies under Croson. However, notwithstanding that concession the Solicitor General so narrowly defines the scope of that deference so as to leave it a distinction without a difference. U.S. Brief, Metro at 12.

interest, the courts must similarly pay more deference to Congress' selection of the appropriate remedy then they would to the choices of state and local governments.

Examining the factual predicate of the plan at issue in Croson, this Court held that local government officials could only impose a race-conscious remedy if they had sufficient evidence of identified discrimination in a particular industry within their jurisdiction. Mere societal discrimination against minorities was held to be insufficient as a factual predicate.

Conversely, the Court reiterated the holding of Fullilove, that Congress "may identify and redress the effects of society-wide discrimination". Croson, 109 S.Ct. at 719. In Fullilove, the Court found it unnecessary for Congress to have had before it evidence of identified

instances of racial discrimination in the national construction industry.

Of course, this does not imply that Congress need make no findings whatsoever, or that it can simply take legislative notice of our nation's sordid history in race relations. However, in assessing the effects of societal discrimination in the broadcast industry, Congress must certainly be free to rely upon "information and expertise that Congress acquires in the consideration and enactment of earlier legislation", Fullilove, supra, 448 U.S. at 502-503, and the courts should pay due deference to that expertise.

Contrary to the arguments of the Solicitor General, Congressional remedies need not be so narrowly tailored as to be "victim specific".[76]

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[76] U.S.Brief, Metro at p.23.

> [I]t is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor.

Wygant v. Jackson Board of Education, 476 U.S. 267, 287 (O'Connor, J., concurring) (1986).

This Court has not limited its endorsement of sufficiently compelling justifications for racial classification to remedying the effects of identified present or past racial discrimination.

> a state interest in the promotion of racial diversity has been found sufficiently "compelling", at least in the context of higher education, to support the use of racial considerations in furthering that interest.

Wygant, supra, 476 U.S. at 286 (Citing Regents of University of California v. Bakke, 438 U.S. 265, --- (1978) (Powell, J.); NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976), (FCC regulations dealing with

employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.") See also, Croson, 109 S.Ct. at 731 & n.2 (Stevens, J., concurring).

The principle predicate for all race-conscious measures is the awareness that past discrimination and exclusion has continuing effects which the society wishes to change. However, those effects are not limited to individual victims of discrimination, or to members of the community who share the economic deprivation and discrimination, directly and indirectly. Rather, the effects include the harm done to the society as a whole, which denies itself the full benefit

of the genius, labor and enthusiasm of a significant number of its citizens.

> Lack of minority representation among owners of broadcast stations, the Commission held, "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."[77]

The minority ownership policies seek to enhance diversity in perspective in the broadcast media: a First Amendment imperative that overlaps with the Commission's mandate to regulate the industry in the public interest, without directly regulating content.

This goal intersects with the Equal Protection values of the Fifth and

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[77] Brief For Federal Communications Commission, Astroline v. Shurberg, No. 89-700, at 7.

Fourteenth Amendments, in that prior discrimination, both societal and industry specific, has lead to a lack of minority perspective and participation in the broadcast media.

Applying its traditional approach of promoting broadcast diversity by insisting on diversity of ownership, the FCC has addressed the need of insuring diversity of perspective, by insisting that the perspective of minority populations be included in the broadcast spectrum.

The Commission's initial attempts to achieve this end via Equal Employment Opportunity regulations and ascertainment policies;[78] relaxation of minimum showings

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[78] 1978 Minority Policy Statement, 68 F.C.C. 2d at 981 (Pet. App. 1301-331); Random Selection/Lottery Systems, 88 F.C.C. 2d 476, 489 (1981).

of financial qualifications;[79] and, increasing the number of new broadcast stations available for initial licensing;[80] failed to achieve the desired goal of increased minority perspective and participation.

The minority enhancement and distress sale policies are an effort to obtain this goal utilizing the traditional method of FCC regulation, i.e., by looking to ownership, and encouraging minority

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[79] See FCC Minority Ownership Task Force, Minority Ownership in Broadcasting (1978) at 11-12; New Financial Qualifications for Aural Applicants, FCC 78-556 (Aug. 2, 1978); New Financial Qualifications Standard for Broadcast Television Applicants, FCC 79-299 (May 11, 1979)

[80] See e.g., Availability of FM Broadcast Assignments, 101 F.C.C. 2d 638 (1985), reconsid. granted in part and denied in part, 59 Radio Reg. 2d (P&F) 1221 (1986), aff'd, National Black Media Coalition v. F.C.C. 2d 277 1345 (1980).

ownership. These policies were based on the Commission's belief that

> "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . ." and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." Id. at 981 (Pet.App. 134a).[81]

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[81] Brief For Federal Communications Commission, Astroline v. Shurberg, No. 89-700, at 6 (citing 1978 Minority Policy Statement, 68 F.C.C. 2d at 981)(Pet.App. 134a, 133a).

CONCLUSION

For the above reasons the decision of the Court of Appeals should be affirmed.

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